

Exhibit K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

20 cv 10832 (AT) (SN)

RIPPLE LABS INC. *et al.*,

Defendants.

New York, N.Y.
June 7, 2022
3:35 p.m.

Before:

HON. SARAH NETBURN,

Magistrate Judge

APPEARANCES

U.S. SECURITIES AND EXCHANGE COMMISSION
Attorneys for Plaintiff

BY: PASCALE GUERRIER
LADAN F. STEWART
MARK R. SYLVESTER

DEBEVOISE & PLIMPTON, LLP
Attorneys for Defendant Ripple

BY: LISA R. ZORNBERG

CLEARY GOTTlieb STEEN & HAMILTON LLP
Attorneys for Defendant Garlinghouse

BY: MATTHEW SOLOMON
NOWELL D. BAMBERGER

PAUL WEISS RIFKIND WHARTON & GARRISON LLP
Attorneys for Defendant Larsen

BY: MARTIN FLUMENBAUM

1 (Case called)

2 THE DEPUTY CLERK: Starting with the Securities and
3 Exchange Commission, please State your names for the record.

4 MS. GUERRIER: Good afternoon, your Honor. I'm
5 Pascale Guerrier on behalf of the SEC.

6 THE COURT: Thank you.

7 MR. SYLVESTER: Good afternoon, your Honor. Mark
8 Sylvester for the SEC.

9 THE COURT: Thank you.

10 MS. STEWART: And Ladan Stewart for the SEC. Good
11 afternoon.

12 THE COURT: Good afternoon. Thank you.

13 Why don't you just state your clients since I'm not
14 sure who is sitting in what order.

15 MR. SOLOMON: Good afternoon, your Honor. Matthew
16 Solomon representing Brad Garlinghouse.

17 MS. BAMBERGER: Good afternoon, your Honor. Nowell
18 Bamberger representing Brad Garlinghouse.

19 MS. ZORNBERG: Good afternoon, your Honor. Lisa
20 Zornberg on behalf of Ripple Labs.

21 MR. FLUMENBAUM: Martin Flumenbaum on behalf of
22 Christian Larsen.

23 THE COURT: Thank you.

24 First, I'm Judge Netburn. It's nice to see you all.
25 We've had a lot of telephone conferences. I'm happy to have

1 you all here in court. It's nice to see you all.

2 Second, thank you for accommodating the last-minute
3 switch. Our version of supply-chain problems is with respect
4 to court reporters. So getting a court reporter here can be
5 difficult. So to accommodate the court reporters, we had to
6 move it. So I appreciate everybody's last-minute move on that
7 front.

8 Lastly, with respect to the court reporters, if
9 everyone can make sure they always are speaking into the
10 microphone, it will facilitate her ability to transcribe the
11 conference correctly.

12 All right. So we are here on the letter brief that
13 the SEC filed in connection with its application to withhold
14 certain documents in connection with the Bill Hinman speech on
15 the grounds that they are protected by the attorney-client
16 privilege. I've read the SEC's April 29 and May 18 reply
17 letter and the defendants' joint letter filed on May 13.

18 Let me jump right in and begin with the SEC. So I'd
19 like for you to help me understand what legal advice you are
20 arguing that Director Hinman received and for what business
21 purpose that advice was given.

22 MS. GUERRIER: Thank you, your Honor.

23 Your Honor, Director Hinman sought the counsel of SEC
24 attorneys regarding the application of the securities laws to
25 digital assets. The legal advice that Director Hinman received

concerned the federal securities laws.

THE COURT: Can you make sure your microphone is even closer. Sorry. With the mask, it's a little hard to hear, and I want to hear everything that you're saying.

MS. GUERRIER: Should I start again, your Honor?

THE COURT: Please.

MS. GUERRIER: Director Hinman sought legal counsel from SEC attorneys, beginning with the attorneys in the Division of Corporate Finance, about the application of the securities laws to digital assets in connection with the speech that he gave on June 14, 2018.

That speech was very legal, purely legal, and addressed legal issues.

THE COURT: The speech was legal you said?

MS. GUERRIER: Yes, your Honor. Basically the speech addressed the securities laws application to digital assets. So when Director Hinman sought the counsel of the SEC attorneys, he wanted their legal advice regarding the application of the securities laws to digital assets, especially regarding when an offer of sale of a particular digital asset becomes a security under the federal securities laws.

In the first 23 drafts that we've asserted the attorney-client privilege for, that communication from counsel, SEC attorneys, to Director Hinman concerns purely legal issues

1 regarding the subject matter.

2 THE COURT: What was the legal advice for? I
3 understand what he was told you describe as legal advice
4 because it was about the legal standards concerning digital
5 assets.

6 But what was he seeking that advice for?

7 MS. GUERRIER: Director Hinman wanted to make sure, in
8 terms of the legal issues, not inconsistent with the SEC's
9 position on the securities laws' application to digital assets.

10 So he needed to speak with attorneys who were versed
11 in the field of the securities laws in connection with digital
12 assets so that his speech was not inconsistent with the SEC's
13 position, legal position, on the securities laws as it applies
14 to digital assets. So that was why the legal advice was
15 sought, and that was the purpose of obtaining that legal advice
16 from SEC attorneys.

17 THE COURT: Because he didn't want to say, I think the
18 Howey factor is applied this way only to have the SEC take a
19 position that it applied a different way?

20 Is that the concept?

21 MS. GUERRIER: I think the concept is what exactly is
22 the security -- what is the law on digital assets and is he
23 saying something that is inconsistent with that legal position
24 of the SEC, so whether or not he could say something that
25 contradicts the SEC's legal position on the securities laws'

1 application to digital assets.

2 THE COURT: So he wasn't seeking legal advice to
3 educate himself on the legal standard? He was just saying,
4 this is what I'm going to say. Is this inconsistent with what
5 you said earlier?

6 MS. GUERRIER: Your Honor, no. He needed to educate
7 himself on the legal standards with regards to how the
8 securities laws applied to digital assets. He needed that
9 advice from the SEC attorneys.

10 And in connection with his speech, the way that he
11 gave that speech, he spoke a lot about Howey factors. He spoke
12 about the securities laws' applications to digital assets. But
13 in the drafting of that speech, he wanted legal counsel as to
14 how the securities laws apply to digital assets.

15 THE COURT: Okay. We've been talking about Mr. Hinman
16 I think since August of 2021. Then the issue of his deposition
17 came up. There was a position that the SEC took that he was
18 not speaking on behalf of the SEC when he gave that speech and
19 that his statements cannot be imputed to the SEC; that they
20 were his own personal views.

21 Do you stand by that position today?

22 MS. GUERRIER: If I may clarify. If the speech is
23 determined to be his personal speech, as the Court has ruled,
24 that doesn't change the fact that he sought legal counsel about
25 the legal issues that were before him prior to providing that

1 final speech.

2 And he not only sought legal counsel within the
3 division of corp. fin., he also sought legal counsel from other
4 divisions that also were interested and had something to say
5 about the law with regards to the application of the securities
6 laws to digital assets. And that's trading and markets and
7 investment management.

8 So even if the speech turned out to be, as the Court
9 stated, his personal views on the application of the securities
10 laws to digital assets, it does not change the fact that he
11 sought legal counsel about some of the legal issues that he
12 encountered in that speech.

13 And I also note to the Court that the first draft of
14 the speech was created by the chief counsel for the Division of
15 Corporate Finance.

16 THE COURT: So here's where I get hung up: I
17 understand that he is alleged to have sought legal advice from
18 lawyers about these issues. Lawyers for the SEC are lawyers
19 for the SEC, which is to say that the SEC is the client. And
20 so if he is receiving legal advice from the agency's lawyers,
21 it would be, I think, for the purpose of providing legal advice
22 to the agency who is the client.

23 And so here is where I'm having this tension because
24 the purpose of the attorney-client privilege, if we can pull
25 the lens back for a moment, is because we have an interest

1 in -- and I'll use "agencies" since that's what we're talking
2 about here -- in agencies making decisions in accordance with
3 the law and consulting with their lawyers to make sure they
4 understand the limits of the law so that they can conduct
5 public business appropriately.

6 The SEC has distanced itself from Mr. Hinman's speech
7 and said that that had nothing to do with the SEC, those were
8 his personal views, and he made that speech based on how he
9 believed the law should be applied or what he thinks about
10 digital assets.

11 So I'm having a hard time reconciling the purpose for
12 which we have the attorney-client privilege to allow agencies
13 to consult with lawyers so that they can make decisions based
14 on what the law requires and the SEC's position in this
15 litigation that Hinman was acting on his own and giving a
16 speech based on his own personal views.

17 And so when I asked you what was the purpose of the
18 legal advice, it's because I think for agency counsel to give
19 legal advice to its client, the SEC, there must be a purpose
20 for that; that the client is saying, we're going to do
21 something or not do something consistent with the law and we
22 need to consult with lawyers to make sure that we are acting as
23 the law requires.

24 But your position seems to be that he is getting legal
25 advice from agency counsel so that he, Mr. Hinman, can give his

own opinion on how the law should be applied. And I think that there's a real tension there.

And I'm having a hard time reconciling the purpose of the attorney-client privilege, the nature of the privilege within an agency representation and who the client is, with the SEC's position in this litigation that Mr. Hinman's speech cannot be imputed to the SEC and it can't be viewed as the SEC's word.

In your reply letter, you talk about getting counsel for the purposes of developing the speech. I'm not exactly sure what that is. You used that phrase "developing the speech," multiple times in your letter.

I'm not exactly sure what legal advice can be given for the purpose of developing a speech or whether that would even be available to you. So I'm trying to really hone in on what we're talking about here, what the purpose of this advice was.

MS. GUERRIER: If I may respond, your Honor. So let me just try to clarify the SEC's position.

We're not taking the position that the Commission made -- the speech was the Commission's speech. There was no Commission speech. This was a speech by Director Bill Hinman in his capacity as director of corp. fin.

Now, the issue is who is the client in this situation. And we're saying that --

1 THE COURT: I hate to interrupt you, but you just said
2 something that seems different to me. You said that the speech
3 was given by Director Hinman in his capacity as director of
4 corporate finance. That seems different to me than what you
5 said a year ago.

6 Am I misremembering? Because when we were discussing
7 whether he should be deposed, as I recall, there was argument
8 from the SEC that what he said really had no bearing on this
9 litigation because he wasn't speaking on behalf of that
10 division; that he was really just speaking at a private event.
11 And there was a lot of attention focused on the disclaimers.

12 But you just said just now that he was speaking as
13 director on behalf of that division.

14 MS. GUERRIER: Yes. What I'm saying is that he
15 presented the speech as the director of corp. fin. giving
16 basically advice to the market. This is not unusual. This is
17 something that the director of corp. fin. does.

18 In doing so, there was a disclaimer that the SEC does
19 not take any position on the speech and that the speech
20 reflected Director Hinman's personal views. That does not
21 change the fact that Director Hinman was the client in this
22 situation because he sought legal advice from SEC attorneys.

23 And I submit that just because he's the director of
24 corp. fin. does not mean that he cannot be a client of the SEC
25 attorneys because he was acting in his position as the director

1 of corporate.

2 He could not have given a speech, a personal speech,
3 because the information about the legal issues before the SEC
4 would not have been available to him as Director Hinman, the
5 person.

6 So the only way that Director Hinman could have access
7 to the information, the communication that he sought the legal
8 advice about, would have to be in his capacity as the director
9 of corp. fin.

10 That information is confidential information within
11 the purview of the SEC. That is not information that could be
12 shared outside of the confines of the SEC. Director Hinman
13 could not have gone to his own personal counsel to discuss the
14 legal issues regarding the application of the securities laws
15 to digital assets.

16 Now, there are cases that basically say in a
17 government entity, government employees and other directors,
18 they can be the client of the actual government attorneys. And
19 we cited some of the cases in our opening brief.

20 Director Hinman was the client in this case. The
21 attorney-client relationship or the privilege requires that
22 there be an attorney-client relationship. And in determining
23 who is the client, we're looking to see was Director Hinman
24 acting in his capacity as a director of corp. fin. and did he
25 seek the advice that he sought as the director of corp. fin.,

1 not as a private citizen, Director Hinman, concerning a speech
2 that has to do with legal issues before the SEC.

3 Director Hinman approached SEC attorneys and discussed
4 the legal issues related to the digital assets in the context
5 of his employment with the SEC. That the speech reflected his
6 personal views really is not inconsistent with this position
7 because the director could give a speech that reflects his
8 personal view.

9 That's a separate event. That does not change the
10 issue did he seek legal counsel from SEC attorneys, and that's
11 what he did. And in that instance, when he sought legal
12 counsel, he was the client and SEC attorneys were providing
13 legal advice.

14 Again, your Honor, the speech, again, was given by
15 Director Hinman in his official capacity. You could call it a
16 private event, but it was really in a public forum at the
17 Yahoo! forum for crypto. Director Hinman addressed legal
18 matters at that speech.

19 He addressed purely legal issues concerning Howey,
20 concerning how the securities laws applied to digital assets.
21 But behind the scenes when the draft was being created, the
22 issue is was Director Hinman seeking legal counsel from SEC
23 attorneys.

24 And he's allowed to do that. We've cited the cases in
25 our brief, for example, *National Broadcasting v. SBA* where the

1 attorney-client privilege protected an officer's/director's
2 request to a chief counsel for a legal opinion. And there are
3 other cases in the brief.

4 THE COURT: I'm familiar with the law here, and I
5 don't think the law is that controversial. I think it's
6 actually pretty clear. To me, the biggest issue is trying to
7 reconcile the position that the SEC has taken in this
8 litigation with the position you're taking here today.

9 And, again, a year ago when we were talking about this
10 deposition and even otherwise in this litigation, the SEC has
11 distanced itself from this speech, distanced itself from the
12 sort of advice or interpretation that Director Hinman expressed
13 there.

14 And this speech has played a central role I think from
15 the defendants' perspective -- and I'll hear from them in a
16 moment -- about how Ripple and its officers understood the
17 SEC's approach here.

18 And it seems to me that the SEC took a position
19 earlier in this litigation to distance itself from the speech
20 and now is taking a position to embrace the speech for purposes
21 of cloaking this material.

22 And, again, under the law, I don't think the law,
23 again, is that controversial or hard to apply as a general
24 proposition. In fact, I feel like we are talking about this
25 speech in different lights, depending on how it suits the SEC.

1 MS. GUERRIER: So, your Honor, may I address the
2 Court?

3 THE COURT: Please.

4 MS. GUERRIER: I don't think we're saying that
5 Director Hinman is not acting in his official capacity. The
6 SEC distances itself from the actual speech if to the extent
7 that it represents Director Hinman's personal views. The SEC
8 has a disclaimer for speeches that are given by people in
9 Director Hinman's position. The disclaimer is that the SEC
10 does not --

11 THE COURT: If we want to pull up the transcript of
12 his speech, can you tell me which were his personal views and
13 which were the SEC's statements?

14 MS. GUERRIER: Well, again, the disclaimer given in
15 that speech is that the SEC was not taking a view on
16 Director Hinman's speech. Director Hinman was not speaking as
17 the Commission. That's the distinction. Director Hinman gave
18 a speech as the director of corp. fin.

19 And as the Court ruled and even if we accept that the
20 speech contents reflect Director Hinman's personal views, that
21 does not change the attorney-client analysis, whether or not
22 Director Hinman sought legal guidance, legal counsel, from
23 attorneys at the SEC in his capacity as the director of corp.
24 fin.

25 He did so. He sought legal counsel. The fact that

1 the speech at the end of the day included his personal views
2 does not change the analysis of what happened when the draft of
3 the speech was being created.

4 So I don't think we're taking an inconsistent
5 position. I think we're saying that Director Hinman -- he
6 would not have given a speech as a private Director Hinman
7 because he would not have had access to this information.

8 He could not have sought legal counsel regarding these
9 legal matters from a private attorney. These were
10 confidential, legal issues that were being contemplated and
11 reviewed by different divisions within the SEC.

12 Director Hinman gave the speech telling the market
13 this is how basically corp. fin. could deal with this. These
14 are my views. That does not change the fact that he sought
15 legal counsel. The question is did he seek legal counsel, and
16 we assert that he did.

17 He did so primarily within corp. fin. And then he
18 sought the legal counsel of other divisions. If you look at
19 the drafts of the speech that we selected for which we're
20 asserting the attorney-client privilege, you could see that he
21 is receiving legal advice from the attorneys.

22 THE COURT: Would the SEC take the position in this
23 litigation that as of I think it was June 2018 when the speech
24 was given that that speech reflects at least corp. fin.'s
25 position with respect to this issue?

1 MS. GUERRIER: We could say that Director Hinman was
2 given corp. fin.'s position.

3 THE COURT: You need to answer my question.

4 Did that speech reflect the position of corp. fin. in
5 2018?

6 MS. GUERRIER: Yes. This is a position that corp.
7 fin. -- based on Director Hinman's views, this is what corp.
8 fin. was telling the market. So I would say, your Honor, that
9 the position is that this is corp. fin.'s position as stated
10 through Director Hinman's lenses.

11 THE COURT: I don't understand the caveat because if
12 the speech was given from corp. fin., then it could be anybody
13 who gave it and it just happened to be Hinman. Or it's Hinman
14 who's giving it, and it's just his views and corp. fin. is not
15 adopting them as their own.

16 And I think that is where I am struggling because
17 every time I ask you if that was corp. fin.'s position, you say
18 it was, as given through Hinman. But he is just an officer at
19 that moment.

20 MS. GUERRIER: What we're saying is that even if the
21 speech does reflect Director Hinman's personal views as the
22 director of corp. fin. and he's telling the market, this is how
23 I think we should deal with digital assets, that's a separate
24 inquiry from what happened when the speech was being drafted.

25 It doesn't really matter that at the end of the day,

1 the speech ended up reflecting his personal views. What
2 matters is did he seek the legal advice and was it regarding
3 these legal issues that were before him and the SEC.

4 These are two separate inquiries, your Honor. So
5 whether or not the speech reflected his personal views does not
6 change the analysis of when the attorney-client privilege
7 applies. He was the client in this situation, and the SEC
8 attorneys were the attorneys providing legal guidance.

9 And if I may respectfully, your Honor, if the speech
10 does reflect his personal views, then it cannot be relevant to
11 any claim or defense in this case. And even if the speech is
12 covered by the attorney-client privilege, which we assert that
13 it is covered because Director Hinman sought the -- the
14 predominant purpose of the counsel was for legal advice -- it's
15 still not relevant under Judge Torres' ruling for how to
16 evaluate fair notice.

17 THE COURT: That I'm not going to get into.

18 MS. GUERRIER: So, your Honor, I don't mean to
19 distract and move into another area but just to show that
20 that's a separate inquiry, whether or not corp. fin. washes its
21 hands from Director Hinman's personal speech or whether or not
22 Director Hinman gave the speech as the director of corp. fin.
23 But we assert that he gave the speech as Director Hinman, the
24 director of corp. fin. At the time that he gave the speech,
25 that was his role. He did so in his capacity as the director

1 of corp. fin.

2 When he sought the legal advice from the divisions --
3 trading and markets, investment management and corp. fin. -- he
4 did so as the director of corp. fin. The information, the
5 communication, that he sought and he received advice about was
6 confidential communication about legal matters before the SEC.

7 That's the question, what did he seek the legal advice
8 about. He sought the legal advice about the application of the
9 securities laws to the digital market. He did so in his role.
10 He could not have done this as just personal Bill Hinman in his
11 individual capacity unrelated to his job duties.

12 THE COURT: Okay. Thank you.

13 Mr. Solomon, are you going to take the lead on this
14 from your table?

15 MR. SOLOMON: Yes, I am, your Honor.

16 THE COURT: Okay. Just make sure you speak into the
17 microphone so the court reporter and I can hear you.

18 MR. SOLOMON: If your Honor would prefer, I'm happy to
19 go over to the podium and take my mask off. I don't know if
20 it's permissible in this courtroom. Otherwise, I'm fine
21 staying here. I just don't want to be muffled.

22 THE COURT: I think it's up to you.

23 (Pause)

24 THE COURT: I think if your colleagues -- you're far
25 enough from the SEC. I think if your colleagues are

1 comfortable with you taking your mask off, I think it's
2 acceptable, I think, if everybody is comfortable.

3 If anyone is uncomfortable -- I don't want anyone to
4 feel uncomfortable. But you seem to be far away from the
5 people behind you and far away from the people in front of you,
6 and we have the HEPA filter going.

7 MR. SOLOMON: Thank you, your Honor. And I see head
8 nods from my colleagues. Just for the record, everybody seems
9 comfortable. Thank you very much.

10 I think your Honor is struggling to get an answer for
11 something we've also been struggling to get an answer on for
12 the past year or so. The SEC has characterized the Hinman
13 speech in different ways depending on the argument that it's
14 making.

15 If it's making a fair notice argument, it may
16 characterize it one way. If it's making a deliberative process
17 privilege argument, it may characterize it a second way. And
18 here we are at the attorney-client privilege stage, and we have
19 yet a third interpretation of what that speech was.

20 I think fundamentally, though as your Honor pointed
21 out, the law is not controversial on this. The predominant
22 purpose for each and every communication that former
23 Director Hinman had preceding the speech must be legal advice.

24 And when we look at the evidence -- we haven't seen
25 the documents you have and the SEC has. We haven't seen them.

1 But all of the evidence strongly suggests to us that Mr. Hinman
2 was conveying his personal views and that in connection with
3 seeking input, guidance, reactions from others who might have
4 views of their own, he gave a speech that expressed those
5 personal views.

6 The Court's already found that, and the Court has
7 properly found that because in the disclaimer of the speech
8 itself, it's very clear that Mr. Hinman says, these are my
9 views and not necessarily those -- not just of the Commission
10 but of the staff.

11 And if you go back to August of 2021 to the SEC's
12 response on our motion to compel, just to take your Honor back
13 through the history that you were referring to, the SEC then
14 said Director Hinman stated his belief that Bitcoin and Ether
15 were not currently offered as securities.

16 And this was in connection with the fair notice
17 defense. So they had an interest in saying his belief there,
18 because if it was if it was something other than his belief,
19 they believe it might be more potent for the fair notice. We
20 don't think that's the case, but that was their view.

21 Then in September of 2021, in their letter reply
22 regarding deliberative process privilege claims, they said:
23 "The draft speech and corresponding email are pre decisional
24 and deliberative as Director Hinman was seeking feedback from
25 other SEC personnel about the speech's contents prior to

1 delivery. As such --" and I'm quoting -- "the staff was
2 deliberating on what the speech should say, and no final
3 decision had been reached. Such drafts and related emails are
4 protected by the DPP."

5 Then we get to December 2021, and your Honor will
6 recall that the Second Circuit's NRDC decision came out, and
7 you asked for letter briefing on that. They used the NRDC to
8 say that the speech was part of the messaging of an SEC policy,
9 yet another inconsistency.

10 And then we move forward to February of 2022, and this
11 was the SEC's motion for reconsideration and clarification of
12 your Honor's deliberative process privilege ruling. The SEC
13 wasn't happy with one aspect of that ruling, the Hinman
14 documents. Your Honor ruled for the SEC for the most part on
15 those deliberative process privilege claims but not on that
16 one.

17 In response to that, the SEC says, again:
18 "Director Hinman was seeking feedback from other SEC personnel
19 about the speech's contents prior to delivery in the same
20 document. Drafts of the speech reflect opinions and thoughts
21 of staff, other than Director Hinman. It was intended to
22 communicate the general approach used by corp. fin. in
23 evaluating whether digital asset offerings may be security
24 offerings."

25 What you're not hearing in here was representations

1 from the SEC that Director Hinman was receiving legal advice in
2 connection with that speech. That wasn't a convenient argument
3 to make at the time. They didn't make it.

4 And going back to the primary pieces of evidence in
5 this case, as your Honor did with the deliberative process
6 opinion, your Honor wrote, if you look at the Hinman
7 declaration, he doesn't say he was seeking legal advice.

8 If you look at the Hinman deposition, as your Honor
9 probably has -- and I can cite passages from it -- he
10 repeatedly talks about "my views." "Whenever I was out
11 speaking, that was something I individually." That's page 121.

12 In fact, when we put the question to former
13 Director Hinman whether he was giving the speech in his
14 capacity as corp. fin. director, he refused to answer the
15 question. And perhaps he refused to answer it because he
16 wanted to toe a line about it being his personal views because
17 the SEC doesn't want to be bound by those views.

18 And that's fine. That's why they had the disclaimer
19 in the speech. And that's why the current chair of the SEC has
20 said quite clearly he would not agree, for example, that Ether
21 is not a security.

22 That is his right, and he's not bound by that prior
23 speech because that prior speech was given by Director Hinman
24 and they were his personal views, not necessarily those of the
25 Commission and not necessarily those of the staff.

1 And so he even went on to say in his deposition at
2 page 70: "We, corp. fin., do not provide legal advice to the
3 public." And he said he never did.

4 So I think pulling the lens back is absolutely the
5 right thing to do here. It's very hard to parse through the
6 various twists and turns of the papers over the last year.
7 We've tried to do it too. It's not easy. It's not a clean
8 line.

9 So I think what we tried to do, your Honor, in our
10 briefing, what I'd like to do just in a couple more minutes
11 today, if you'll indulge me, is when you pull the lens back and
12 you look at this holistically, what's really going on here.

13 It is Director Hinman giving views, policy views
14 principally, on how the regulatory regime may or may not apply
15 to digital assets. And if you look at the speech itself, as
16 your Honor has, it's laced with the words "I" and "we" and "my"
17 I think 20 times by my count, including the footnotes.

18 You see "we" three times. And you see "we" as in come
19 talk to the SEC. We would talk to you about your views, the
20 public. And then you can do a legal analysis of those views.
21 But he wasn't doing a legal analysis. Sure he used the word
22 "Howey" in his speech. And pretty much everything the SEC does
23 could be said to have something to do with the law.

24 But as your Honor knows from the *Erie* case -- Judge
25 Jacobs was very, very clear -- is the predominant purpose legal

1 advice. And there just isn't any record evidence to speak of
2 that it was, and all the available evidence is that it wasn't.

3 And the SEC can make arguments, and that's fine. But
4 looking at the record, looking at what he said under oath in
5 his deposition, looking at the speech itself for hallmarks of
6 was this a legal document -- I think counsel for the SEC said
7 it was purely legal. I just objectively don't think that's
8 correct.

9 That speech doesn't read like a legal document. It
10 reads like policy musings of somebody, by the way, who is very
11 steeped in the securities laws. Former Director Hinman was a
12 partner at major law firms for many years, a capital markets
13 expert. He didn't need to go to the SEC and have them explain
14 what Howey was. He knew that.

15 I haven't seen the communications, but it just doesn't
16 strike us that it's possible or likely that the predominant
17 purpose of that dialogue was to provide legal advice.

18 And even when you look at the arguments the SEC has
19 made on the basis of those documents, we noticed, when we were
20 going back through that, some of the comments are the comments
21 of trading and markets. So it seems like there may have been
22 different comments and different perspectives coming in from
23 different quarters. And that's fine. There's nothing wrong
24 with that.

25 But it's not deliberative process, as your Honor has

1 already ruled. And I don't think the attorney-client privilege
2 helps anymore. That's probably why that wasn't argument one to
3 your Honor all along because of course attorney-client
4 privilege cannot be overcome with a showing of need. DPP can.

5 So I think, again, going back through the history,
6 looking at the speech, looking at what he said and what he
7 didn't say, it's hard to square the circle. And it does seem
8 to us as well that the way to analyze it is exactly what your
9 Honor said, what was the purpose of this legal advice.

10 And it's hard to see that purpose when you look at the
11 record evidence and all of it screams policy, talking to the
12 market, inviting people to talk to the SEC, not being
13 prescriptive.

14 And in fact, the last point I'll make, your Honor --
15 and I'm happy to answer any questions you have -- is if you
16 look at the speech itself, it specifically says that this is
17 not a full legal analysis. These are some factors that I,
18 Director Hinman, are putting out for consideration.

19 I think that's what it was. And I think under all
20 those circumstances and if you look at the case law, he was not
21 the client. He was acting, sure, as director of corp. fin. He
22 didn't resign as director of corp. fin., give the speech, and
23 then become the director of corp. fin. again. We're not saying
24 that. That's ridiculous.

25 What we're saying is that he expressly gave that

speech stating his personal views, not stating the Commission's views. We agree. I guess you've heard today that it was corp. fin.'s view also, but I'm not sure that I even got a sense of whether the SEC is embracing that, again, probably because looking at the evidence in its totality, it really does amount to his views. And if it's his views, it's hard to see an attorney-client relationship existing.

Even if one did or could be said to exist, it's really hard to see -- again, you have the documents. We don't -- how the purpose of those communications preceding that speech, in light of all of the litigation so far in the record evidence, were principally legal.

THE COURT: It seems like there are two different things you're talking about right now I think. The first is whether or not the advice that was given was legal in nature or more policy or messaging or the like, which would not be covered.

But I think there's also something that you focus on, which is what I was looking at, which is the purpose of the advice because the purpose of getting the advice is to conduct public business in the context of an SEC staff person getting advice from SEC lawyers.

But both sides cite the same cases. Again, the law is not really controversial here. When you look at the attorney-client privilege, you need to make sure that it's a

1 communication with a client and it's for the purpose of
2 obtaining legal advice. And when you're talking about it in
3 the context of an agency, it's because they're conducting
4 public business.

5 And so I think there are two different questions I
6 have. One is the actual advice that was given, was that legal.
7 Or was it policy or deliberations or something else. And
8 secondly, what was the purpose of the advice. And if the
9 purpose of the advice was not to conduct agency business, then
10 I think that there is a break in the chain.

11 But it sounds to me that your primary argument, if I'm
12 hearing you, is more about the nature of the advice than the
13 purpose for which it was given.

14 Is that fair?

15 MR. SOLOMON: I think that's fair. But we think the
16 purpose is relevant also. In assessing whether there is
17 in fact attorney-client advice, I think it is relevant to
18 consider what the purpose is or the nature of the
19 communication.

20 Let me say this: All indications are, your Honor,
21 that the communications are predominantly policy, not
22 predominantly legal. And that's not to say that you haven't
23 seen documents or you will see documents where the word "Howey"
24 is used or the word "legal" is used. That's not the test, as
25 your Honor knows from *Erie*.

1 Judge Jacobs was very clear about the need to go
2 through and do an assessment of what the predominant purpose
3 was. And, again, we think all the record evidence screams the
4 predominant purpose was policy.

5 And in terms of the purpose of the comments, again, it
6 doesn't strike us, based on the record evidence that
7 Director Hinman -- and in fact, you can look at his sworn
8 testimony and look at his declaration.

9 He wasn't going and soliciting advice -- he hasn't
10 said that. The SEC says that now, but he didn't say that --
11 for the purpose of assisting him on legal issues relating to
12 this speech.

13 To the extent there is legal information that was
14 exchanged between Director Hinman and others in the different
15 divisions, that may be incidental to the policy advice that he
16 was getting, the messaging advice he was getting, the way the
17 speech was packaged.

18 I'm sure there are communications -- and, again,
19 you've seen them back and forth between him and the many people
20 in the different divisions. But in the context of giving a
21 speech with his personal views, not expressly announcing agency
22 policy -- the SEC has conceded that. I'm not sure again what
23 their position is exactly on whether it was corp. fin.'s views.

24 But any way you slice it, if it's not predominantly
25 legal, it's not protected. It's not privileged. And if the

1 purpose of seeking that advice isn't to provide legal advice to
2 him but instead some other purpose -- again, around packaging,
3 messaging, sensitizing the public -- those are things that are
4 policy related. They're not legal related. And it just seems
5 to us that's exactly what was going on here.

6 THE COURT: Thank you.

7 MS. GUERRIER: Your Honor, may I respond?

8 THE COURT: Yes.

9 MS. GUERRIER: The predominant purpose of the
10 counseling that Director Hinman received was legal advice,
11 legal business of the government.

12 The purpose was to provide guidance to the market on
13 legal issues before the SEC. And basically Director Hinman was
14 giving the market the views of how the SEC would treat digital
15 assets under the securities laws.

16 So the predominant purpose of the legal advice -- and
17 if we can look at the entries that reflect the communication
18 between the SEC attorneys and Director Hinman, it shows that it
19 was purely legal advice.

20 For example, if you look at entries 1 through 23,
21 these entries, these are the drafts that went back and forth
22 within corp. fin. They analyze, your Honor, the application of
23 securities laws to digital assets.

24 When you look at when Director Hinman sought comments,
25 legal comments, from investment management and trading and

1 markets, there were also the requests for comments regarding
2 legal issues. And those are drafts 24 to 58.

3 So the predominant purpose of the advice was legal,
4 and the purpose was to conduct government business. It is the
5 director of corp. fin.'s business to advise the public about
6 what corp. fin.'s position is on a particular matter that's of
7 interest to the public.

8 So that the speech may have reflected his personal
9 views does not change the fact that he is conducting government
10 business, the government business of providing that kind of
11 guidance to the market. And he states so in his speech.

12 THE COURT: And you don't think that your statement
13 that the speech, the purpose of the speech, was to provide
14 guidance to the market -- that's what you said.

15 You don't think that that is an inconsistent position
16 to the position that you've taken in this litigation
17 previously?

18 MS. GUERRIER: Your Honor, no, because previously we
19 were discussing the deliberative privilege process.

20 THE COURT: Sorry.

21 MS. GUERRIER: I'm sorry. I'll get closer to the
22 mike.

23 In the context of the deliberative privilege, we were
24 discussing the entries and what Director Hinman's speech meant.
25 Here we're talking about the attorney-client privilege, whether

1 or not Director Hinman was a client, and whether the
2 predominant purpose of the counsel that he sought from the SEC
3 attorneys was for legal advice.

4 THE COURT: Sorry to interrupt you. But set aside the
5 deliberative process issue. In August of 2021, the SEC's
6 position was that what Hinman said was not to provide guidance
7 to the market. And in fact, the SEC opposed his deposition on
8 the grounds that what he said was not a message from the SEC.
9 It was just his personal view.

10 So today you said that it was in fact to provide
11 guidance to the market. I'll obviously go back and look over
12 the filings. But my recollection is that that is an
13 inconsistent position from the position you took 11 months ago.

14 MS. GUERRIER: Let me just try to clarify, your Honor.
15 We're not saying that the Commission took a position one way or
16 another on the contents of Director Hinman's speech.

17 We're saying that this was Director Hinman, as the
18 director of corp. fin., giving this speech. And he's allowed
19 to do that. That's corp. fin. At his position, he can speak
20 on behalf of corp. fin., and that's what he did.

21 Now, whether or not the SEC disclaims the speech and
22 says it doesn't take a position one way or another does not
23 change the fact that the speech was given by Director Hinman in
24 his official capacity. The Commission did meet. There was no
25 Commission agreement about the contents of the speech.

1 So when we're saying that it's not an inconsistent
2 position to state that the SEC did not take a position on
3 Director Hinman's speech, that does not change --

4 THE COURT: The standard for relevance is pretty low.
5 It was the SEC's position last summer that his speech was not
6 relevant.

7 MS. GUERRIER: Right.

8 THE COURT: That it had nothing to do with anything
9 and that it was not relevant and I shouldn't require him to sit
10 for a deposition. Now it seems like it's pretty relevant, even
11 if it's not a statement that the Commission made.

12 MS. GUERRIER: Your Honor, respectfully, we still
13 believe that the speech is not relevant because what happens
14 behind the scenes does not fall under the objective standard
15 for fair notice or scienter.

16 So it's still irrelevant to the claims and defenses in
17 this case. It has nothing to do with whether or not -- because
18 we have an objective standard for determining these issues. So
19 putting that aside, going back to the predominant purpose --
20 and I just want to clarify one thing. At his deposition, he
21 was asked whether he was requesting legal advice, and he did
22 respond that he thought that it was so.

23 If you look at page 273 and 274 of his deposition
24 transcript, that question was posed at his deposition. And he
25 did say that.

1 THE COURT: He said what?

2 MS. GUERRIER: He believed that he was -- he stated
3 that he believed that this may have been legal advice because
4 the question posed was whether in his June 4 email, whether it
5 related to the legal status of offers and sales of certain
6 digital assets.

7 So these were not issues of policy, and his speech
8 does not talk about policy. His speech goes into the
9 application of the securities laws to digital assets. It
10 specifically talks about Howey and different aspects of the
11 law.

12 It's not about regulation. It's not about policy.
13 It's about how the securities laws apply to certain digital
14 assets, and that's throughout the speech. It's not just one
15 word or another.

16 But in terms of what qualifies the communication for
17 attorney-client protection, in this case, Director Hinman, by
18 the entries that we've selected, the predominant purpose of the
19 consultation was to seek the legal advice.

20 Again, the purpose of this consultation is to conduct
21 government business. Director Hinman, in his position as the
22 director -- he's speaking to the market in his position as the
23 director of corporate finance. He's not doing anything that's
24 outside of his profession, of his job basically. So I think
25 that's satisfied.

1 Now, whether he's the client, the issue is was he
2 seeking legal advice. In an entity, even in a government
3 entity, the agency -- the individuals who represent the agency
4 can be the client. In this case, Director Hinman was acting as
5 a client when he posed these questions to the SEC attorneys.

6 And if you look at the -- your Honor, these drafts
7 have to be examined so that you can see whether or not they
8 fall within -- they meet the criteria. And if you look at the
9 advice that was given and the communications that went back and
10 forth, they clearly show, in our opinion, that this is legal
11 advice being sought by Director Hinman of counsel who exercised
12 their knowledge, their legal skills, to answer legal questions.

13 Now, that the speech ended up being viewed as his
14 personal views does not change the equation. The question is
15 was he seeking legal advice. We say the predominant purpose of
16 the consultation was to seek legal advice about how do the
17 securities laws apply to the digital assets. In that capacity,
18 when he did so, he did so as a client of the SEC attorneys.

19 We also assert that we did assert the attorney-client
20 privilege previously. So we're not just asking -- we're
21 reasserting the privilege. It's not like we didn't claim this
22 at the outset. We did.

23 And the entries for which we're claiming the
24 attorney-client privilege, if your Honor had an opportunity to
25 review them, they speak of legal issues, not policy, not

1 business, not anything other than legal issues before the
2 Commission.

3 So in the context of attorney-client privilege, the
4 criteria we believe is met. We have an attorney-client
5 relationship, Director Hinman being the client, the SEC
6 attorneys being the attorneys.

7 The predominant purpose of the communication was legal
8 advice, nothing else. It wasn't business. It wasn't about
9 policy. It wasn't about regulations or anything outside of the
10 purview of the attorney-client relationship.

11 We just submit that I don't think that it's in dispute
12 that the communication was confidential and it remains
13 confidential throughout. But primarily, the predominant
14 purpose was to seek legal advice.

15 THE COURT: That the SEC knew how to act.

16 MS. GUERRIER: Yes. And also to make sure that
17 Director Hinman was not taking any position that was
18 inconsistent with the law, maybe not saying the law in the way
19 that the SEC believes it should be stated, so seeking legal
20 advice to make sure that he got it right and addressing these
21 very legal issues that he addressed at his speech on June 14 in
22 San Francisco.

23 THE COURT: I do think there would be a difference
24 between seeking advice to make sure he's not taking a position
25 that is inconsistent with the position of the agency -- that

1 seems not like legal advice for the purpose of taking action --
2 versus seeking legal advice so that the agency can follow the
3 law.

4 MS. GUERRIER: Well, again, your Honor, I don't think
5 that if you look at the entries that we've selected within the
6 communication, because we're looking at the communication to
7 see whether or not it's protected, you can see that that's
8 exactly what was going on.

9 So if I go back to the first 23 entries, we're
10 analyzing the securities laws. And the exchange of those
11 drafts among corp. fin. allowed them to provide consulting on
12 legal issues related to the securities laws without going into
13 privileged communication because you do have to look at the
14 communication to see what exactly he was looking for and what
15 does the communication say. And we assert that clearly it
16 does -- the predominant purpose of it is legal advice.

17 So I don't think at the end of the day, the final
18 version -- we're not claiming any coverage obviously against
19 the final version of the speech. But that the speech ended up
20 being his personal views does not change the equation, the
21 analysis, the criteria that had to be met for the communication
22 to be protected by the attorney-client privilege.

23 And I submit, your Honor, that if you look at the
24 entries that we selected, you can see that each entry does
25 meet -- the predominant purpose of each entry is for legal

1 advice. In that capacity when he was seeking legal advice,
2 Director Hinman, as the director of corp. fin., was the client
3 of the SEC attorneys.

4 THE COURT: Okay. I understand your position.

5 Anything further?

6 MR. SOLOMON: Just very, very briefly, your Honor,
7 just a couple of points.

8 On page 132 of Director Hinman's deposition, he was
9 asked: "Do you believe this speech provided clarity to the
10 market with respect to the application of the federal
11 securities laws to digitize the transactions?"

12 And his answer was: "I think it provided clarity as
13 to how I was looking at those issues." That's lines 9 and 10,
14 page 132.

15 He was asked again: "Do you believe this was new
16 information to the marketplace?"

17 "I think how I felt about things or the framework I
18 had in my mind was, you know, wasn't something I published in a
19 speech earlier."

20 And later in the deposition, by the way, I think
21 counsel for the SEC indicated that Director Hinman had
22 testified that he did in fact receive legal advice.

23 But the question that was posed to him was: "The
24 question is: Did the information you requested from the
25 various recipients of the June 4, 2018, email relate to the

1 legal status of offers and sales of certain digital assets
2 under the United States securities laws?"

3 That was the question posed, page 273. And then he
4 was told by his counsel: "At a general level, yes or no."

5 And his response was: "At this point, I believe it
6 may have. That's the best of my recollection." So even when
7 they try to point you to something to fortify this view that
8 there was legal advice, even Director Hinman didn't testify to
9 that. He didn't recollect one way or the other.

10 So, again, we don't have the documents. But it's very
11 hard to understand how they could possibly be predominantly
12 legal under these circumstances. And your Honor talked about
13 the purpose of the information he was getting from the other
14 divisions, from various people.

15 If the purpose was for the purposes of his views on
16 the speech, we simply don't think that's attorney-client
17 privilege protected information. And, again, it seems to us
18 that's what was likely going on here.

19 The SEC does seem to want to have it both ways here.
20 On the one hand, they've said Hinman's speech wasn't SEC agency
21 business, again, for purposes of fair notice earlier in this
22 litigation.

23 I think we now hear that, well, actually, it was
24 agency business for purposes of the attorney-client privilege
25 at least. It is a conflict. I think they are trying to have

1 it both ways.

2 We don't relish pointing these things out. But we've
3 got individuals who have been sued here and their livelihoods
4 and their reputations are at stake. So we would like a
5 consistent position. We know your Honor is entitled to that.
6 We would like it. And that's why we've been pressing this
7 issue for over a year, and that's why these documents are so
8 important to us.

9 We would just also just a couple of other points. SEC
10 counsel keeps saying the speech "ended up," "ended up as
11 Director Hinman's personal views." I think she's used that
12 formulation five or six times.

13 They were his personal views expressly. He said so
14 under oath. He said so in his deposition. that's what the
15 disclaimer says. So that cannot be erased, and your Honor has
16 ruled that way. So I don't understand the equivocation around
17 that. But I just want to make the point that they didn't "end
18 up" being his personal views. They were his personal views.

19 By the way, even if the legal information that was
20 given to him was not for him to discharge his official function
21 but in relation to personal views he was giving in a speech, we
22 don't think that's protected for the reasons we've said in our
23 brief.

24 If the comments he received were specific to the
25 speech and he is not going about government business in giving

1 the speech, as he expressly said he wasn't in the disclaimer,
2 that's not protected.

3 Again, Director Hinman himself candidly said in his
4 deposition, when asked, did you give this speech as director of
5 corp. fin. to announce corp. fin. policy, he didn't answer the
6 question.

7 And, again, I don't fault Director Hinman for
8 anything. He's retired. He was doing his best in that
9 deposition. This isn't about him or his reputation. It's
10 about trying to find pieces of evidence to support the view
11 that the SEC is advancing, and we're just not finding any of
12 it.

13 And the last thing I would say, just to come full
14 circle on the law, we agree the law is fairly standardized
15 here. Your Honor has got a better handle on it I'm sure than
16 any of us do.

17 But when you look at *Erie*, one thing that's
18 interesting is that Judge Jacobs points out that you can't find
19 the predominant purpose of a communication "by quantification
20 or classification of one passage or another." Instead, you
21 need to look at it "dynamically and in light of the advice
22 being sought or rendered." And then he gives some examples of
23 that kind of advice.

24 And *Erie* was exactly the kind of case this isn't, an
25 agency lawyer, agency personnel about how to execute the law in

1 a constitutional manner. That's just not what was happening
2 here. We're so far from that here by all available evidence,
3 by his own sworn testimony, and candidly by the SEC's own
4 statements earlier in this litigation.

5 So we would ask that your Honor, having reviewed these
6 documents, make a determination that they are not protected by
7 the attorney-client privilege, and they have all the facts and
8 circumstances and record evidence.

9 Again, I'm happy to answer any other questions. We do
10 appreciate the Court digging into this issue so much. It is
11 very, very important to the defendants. Thank you.

12 THE COURT: Thank you.

13 MS. GUERRIER: May I quickly respond, your Honor?

14 THE COURT: Sure.

15 MS. GUERRIER: So to bring back the issue before the
16 Court, the issue before the Court is whether or not the
17 documents, the drafts, are protected by the attorney-client
18 privilege.

19 Your Honor, we submit that they are because the
20 predominant purpose of the consultation was to obtain legal
21 advice about a legal issue that was before the SEC and
22 specifically as shown in the drafts that we've selected for
23 which we are asserting the privilege.

24 It's very clear, in our opinion, that you can see that
25 these are legal issues being analyzed. And the advice that's

1 being given by SEC counsel to Director Hinman, they're legal
2 advice, not advice about policy, not advice about business or
3 anything else. And one of the questions for predominant
4 purpose is is it legal advice or something else. It wasn't
5 something else. It was purely legal advice.

6 Now, going back to Director Hinman's deposition,
7 Director Hinman didn't say, I don't know. He said that he
8 believes that he may have requested legal advice. When he uses
9 these terms, it's clear that he's referring to legal advice
10 from SEC attorneys. He wasn't referring to anything else. He
11 did not say, I sought personal advice about the speech. Those
12 words were never uttered at the deposition or in his
13 declaration.

14 In the context of the attorney-client privilege, in
15 the case that we talked about, *Erie*, the court did find an
16 attorney-client relationship in this situation where the issue
17 was policy advice rendered by a government lawyer.

18 So here, it's not even policy advice. This is
19 strictly whether or not the securities laws apply to digital
20 assets. So in the context of this case, this issue before the
21 Court, whether or not the attorney-client privilege applies, we
22 believe that the criteria for meeting the attorney-client
23 privilege is met in this case, your Honor.

24 And if you look at the entries and you analyze them,
25 which is what is required of the Court, you will see that at

1 each stage, the drafts were exchanged. It is legal advice
2 that's being provided, not something else. It's only legal
3 advice. Thank you, your Honor.

4 THE COURT: Okay. Thank you very much, everybody. I
5 appreciate your time. I appreciate you coming to court. I
6 hope on a personal level it was nice for you to come back into
7 the courthouse.

8 Obviously I'm taking this issue seriously. Obviously
9 I'm looking at all of the documents that have been submitted to
10 me, and I will get to my ruling as soon as I am able.

11 MS. GUERRIER: Thank you, your Honor.

12 THE COURT: All right, everybody. Stay safe, and
13 we're adjourned. Thank you.

14 (Adjourned)